

Monday, 17 March 1947

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INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
Chambers of the Tribunal
War Ministry Building
Tokyo, Japan

PROCEEDINGS IN CHAMBERS

On

Right of American defense counsel to
take objection to testimony on cross-
examination where the examination in
chief has been by Japanese defense
counsel, and vice versa.

Before:

HON. SIR WILLIAM WEEB,
President of the Tribunal and
Member from the Commonwealth
of Australia.

Reported by:

Julian Wolf
Official Court Reporter
IMTFE

Appearances:

For the Prosecution Section:

Mr. Frank S. Tavenner, Jr.
Mr. S. Horwitz
Mr. David N. Sutton
Mr. Arthur A. Sandusky

For the Defense Section:

MR. WILLIAM LOGAN, JR., Counsel for the
Accused KIDO, Koichi
MR. GEORGE A. BURNES, Counsel for the
Accused SHIGEMITSU, Mamoru
MR. OWEN CUNNINGHAM, Counsel for the
Accused OSHIMA, Hiroshi
MR. MICHAEL LEVIN, Counsel for the
Accused SUZUKI, Teiichi
MR. ARISTEDES LAZARUS, Counsel for the
Accused HATA, Shunroku
MR. LAWRENCE P. McMANUS, Counsel for the
Accused ARAKI, Sadao
MR. GEORGE C. WILLIAMS, Counsel for the
Accused HOSHINO, Naoki
MR. FRANKLIN E. N. WARREN, Counsel for the
Accused DOHIHARA, Kenji
MR. GEORGE YAMAOKA, Counsel for the
Accused TOGO, Shigenori
MR. ALFRED W. BROOKS, Counsel for the
Accused KOISO, Kuniaki
MR. ROGER F. COLE, Counsel for the
Accused MUTO, Akira
MR. BEN BRUCE BLAKENEY, Counsel for the
Accused UMEZU, Yoshijiro
MR. SHIGETAKA HOZUMI, Counsel for the
Accused TOGO, Shigenori

For the Office of the General Secretary, IMTFE:

MR. C. A. Mantz, Clerk of the Court
Mr. H. W. Delaney, Deputy Clerk of the Court

The proceeding was begun at 1300.

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THE PRESIDENT: We have come here to discuss the question of the right of American defense counsel to take objections to evidence where the witness has been examined in chief by a Japanese counsel.

MR. LOGAN: And also vica versa, where a Japanese attorney examines a witness on direct and he is being cross-examined by the prosecution, the prosecutor asks a question in English, the American attorneys get that immediately. The Japanese attorney has to wait until it is translated before he understands what the question is. In the meantime, we will try to convey to the Japanese attorney through an interpreter what objection, if any, should be made and by the time the interpreter gets it to the Japanese attorney the question is answered and we have lost our opportunity. The same thing is true in reverse when the American attorney wishes to make an objection and doesn't understand it until after he hears the translation into English and the Japanese attorney might wish to make an objection.

THE PRESIDENT: Well, that would be a ground for extending the right to the co-counsel of the particular Japanese counsel.

MR. LOGAN: That is right.

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THE PRESIDENT: Well, that would be a ground for extending the right to the co-counsel of the particular Japanese counsel.

MR. LOGAN: That is right.

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THE PRESIDENT: Though we realize these witnesses are not called in the interests of only one accused according to general phases, but it could be arranged that we give you that right but limited to the co-counsel of the particular Japanese.

MR. LOGAN: Well, with respect to that, I would like to point this out to the Tribunal too: For example, we may have a Japanese or an American counsel examining witnesses on the general phases. He may be a purely military man interested in the military as opposed to some of the other interests of the accused in the case. He may hear the question as put by the prosecutor and want an answer to that question as he thinks it might be favorable to his particular client or group of clients in the same phase. On the contrary there are others who want to object to that question as to the form or substance of it because it affects their client. So, therefore, we have a direct conflict of interests.

MR. CUNNINGHAM: We have another proposition there too.

MR. LOGAN: If the one group wants the question asked and the other group doesn't want it asked and they want to press their objection, then, for example, we had a question asked this morning which covered a period

of time from 1937 up through '45 and that affected a number of different accused who were in the Cabinet or Ministry of Education during that period of time, and none of us, who although representing those men during that period of time, was in a position to object to any of those questions. Yet, it might affect three or four different accused.

THE PRESIDENT: Let me make another suggestion. The American counsel selected to take the objections, although there is a Japanese counsel examining in chief, should be one agreed upon by the defense. Each of you still wants to have the right to get up. I am afraid I won't let you.

MR. WARREN: May I be heard on it, your Honor?

THE PRESIDENT: In the interest of justice we may well limit it. In the interests of a speedy trial and without prejudice to a just trial we may limit that number.

MR. WARREN: Your Honor, I do want to be heard on it because I am coming up on this next phase. Here is the impracticability of the suggestion that co-counsel be present in order to protect his client. That is going to be quite impossible in many instances as at present, if your Honor has noticed, I haven't been in the courtroom for several days except occasionally to confer with

American counsel. That is, because I have been preparing the following phase, it is quite impossible for me to be there. It is absolutely impossible. I could not protect my client. It doesn't appear to me that it is feasible for any other counsel to object on the part of the clients that I represent, because they do not know my case. In other words, we are not each one familiar with the other man's case to the point where we would know enough about it to make the objection, and we feel, at least I feel this way about it, that the counsel -- I mean the accused -- are entitled to be represented by counsel of their own choosing.

THE PRESIDENT: Now, let me interpose this: The general phase idea came from the floor of the court and not from the Bench. It came from both sides. The defense wanted it as well as the prosecution, maybe because the prosecution got it. But, I think it is only fair now to us that we haven't exceeded the right to put the phases, but you should meet us by making it unnecessary for, say, fifty counsel to take objections in the course of one witness' evidence.

Your point is all right as regards the individual cases, Colonel Warren. That won't be interfered with.

MR. WARREN: I see, your Honor. If we select for the second phase one counsel to remain in the court-

room to make objections all the time that would be in line with your Honor's suggestion.

THE PRESIDENT: My suggestion is this: When the individuals come to put their case one counsel will carry on throughout. One counsel will deal with all the objections, that is, with reference to his particular witness.

MR. FURNESS: Suppose that the evidence is going to prejudice some one else's client and he wants to object? These cases are twenty-six; they conflict, they are diverse and they are entitled to be represented by counsel of their own choice and they are not being represented by counsel of their choice now.

MR. BROOKS: Suppose you wanted to object to the direct question of the counsel? Some of them in the future may run into that as we get further along in this term of the phase.

THE PRESIDENT: On the individual cases in may be that we will have to fall back on the rules ordinarily applied in courts of justice. It may lead to protracted proceedings, but it has got to be terribly hard to get away from rules that were designed to secure justice.

MR. FURNESS: What will be done, sir --

THE PRESIDENT: This general phase is probably a bit different.

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MR. FURNESS: What will be done, sir, if we ask counsel to make an objection and counsel says "I don't want to make an objection"? I won't make an objection. In the first place, I think the question is all right. In the second place, I think the answer will benefit my client; therefore, I won't press my objection. That has come up in different form on cross-examination from the prosecution as the case went on. People have asked me to ask questions on cross-examination. I said "I won't, I don't want to. I think that question will hurt my client."

THE PRESIDENT: Suppose, as in the case of Mr. McManus today insisting on objecting because he represents an accused who is supposed to have taken a particular interest in education.

MR. McMANUS: Yes.

MR. WARREN: Your Honor, I had hoped to work on this basis on the following phase: Where we have witnesses that we put both an American and Japanese counsel on they are working as a team. They may not be co-counsel and arrange for one to take care of the objections and the other to ask the questions, but they may not be co-counsel. That is going to slow us down considerably.

But, now, when you were speaking about the general phase, sir, did you mean that on the general phase that we select from among men who will present that general phase some counsel to sit in the courtroom and take care of the objections and to present them?

THE PRESIDENT: There must necessarily be a measure of agreement among you in presenting the general phase. Although the witness represents -- speaks for a number of accused, only one counsel can effectively examine him in chief. Why can't one counsel be selected to deal with the objections for the same reason?

MR. WARREN: Well, it might work out in most instances but there might be times -- supposing that there is a question which is asked very beneficial to Baron HIRANUMA. I don't want to object to it. I want the answer in, but it might adversely affect TOJO and his counsel doesn't want it in. He wants me to object. I would be in a very peculiar position to get up and object to an answer that benefits my client and ask that it be stricken. Take this witness today. What he said applied in favor of all the accused.

THE PRESIDENT: Education is a matter which affects all.

MR. FURNESS: Some of us aren't affected at all, your Honor.

THE PRESIDENT: You are all affected as far as the general conspiracy count is concerned. You are all affected.

MR. McMANUS: What I would like to know your Honor is this: Handling a phase like this, one of the particular sub-divisions of the first phase, should not the American counsel have the opportunity to make the objection as he is handling the phase rather than any Japanese counsel who presents his witness, and so forth? Should not the American counsel be permitted to come in there and make the objections for the reasons Mr. Logan stated, that by the time you get the idea over to the Japanese himself it is too late and everything is in the record?

THE PRESIDENT: I don't know that the Court will have any grave objection. Some Members probably would not to an American counsel handling all the objections although the examination in chief has been conducted by the Japanese. But I don't want you to divide them. I mean we don't want you to divide the objection.

MR. LEVIN: You mean one counsel, Mr. President, should handle all the objections; is that it?

THE PRESIDENT: That is the argument on this general phase. When the other matters come along we will deal with it then. It will be time enough to deal

with it then, that is, the individual phases.

MR. LOGAN: I think that it would be helpful at the present time when we run across a situation where an objection either helps or hurts one client something will have to be handled separately if he doesn't want it answered. But, generally speaking, when do you permit American counsel to make objections now? That will be helpful for a while anyway until we run into something more difficult.

THE PRESIDENT: Would you be satisfied that for the time being American counsel should deal with all objections, one American counsel, although examination in chief has been conducted by a Japanese counsel? As far as possible you will fall in with that idea.

MR. FURNESS: We have no choice.

THE PRESIDENT: When some special case arises I think the Court will be just as anxious to give you the right as you would be anxious to get it in special cases.

MR. BROOKS: If special circumstances are shown, your Honor, the Court will listen to that if and when it arises?

MR. FURNESS: We do want to say though, at least I do, I think it is fundamental enough where I

don't want to say I am satisfied. I will obey the Court's instructions.

MR. LEVIN: Mr. President, it occurs to me that it is not too serious a matter to permit other counsel to make objections. I think that we have a classic example of what occurred today. Mr. McManus is particularly interested because his accused, ARAKI, was involved. It wouldn't be possible if a witness is testifying -- would testify in such a manner that half a dozen or more of us would want to make particular objections. Now, it seems to me that unless it got to that point the Court could very well extend the rule a bit until we all got up and then it could say we would have to have a limit to the number of persons who could make objections.

Of course, this morning the only American counsel who wanted to make an objection was Mr. McManus, and when we first began -- when it first began -- all of us were getting up and making objections and after we got organized, as your Honor did say, we were organized and the objections came in in uniform way and a dozen of us didn't get up to make the same objection.

MR. McMANUS: I think I have to make myself clear, if the Court pleases. I am handling this general phase on behalf of the whole defense not because my man

is involved. I will take care of my particular defendant when the individual comes along, and, please, I don't want the Court to get the idea that my man is involved in anything because I am handling part of the general defense.

MR. WARREN: I want to get this matter straight because it will save me trouble in the future. I had hoped because of the knowledge that the Japanese counsel have, which is vastly superior in many instances to the American counsel--- With reference to what an individual witness may say, I had hoped to be able to work it out so they will work in teams with any particular witness and we would have an American counsel to make the objection, the Japanese counsel to do the examining. The Japanese counsel is on familiar ground, the American counsel is on familiar ground but reverse and the other way they probably would not be.

There may be one or two witnesses that would feel peculiar to an American, if he speaks very good English, that an American counsel might have, but that would not carry throughout the phase but would apply to each individual witness and there would be no more than one counsel to make the objection or to argue the questions of objections made by the prosecution.

Now, would that violate your Honor's idea of

procedure at this time?

THE PRESIDENT: I do not know, I will consider it. Anyhow, it's what the Tribunal think.

MR. WARREN: I can see not a great deal of difference between having one counsel go through the whole phase, if you hold two to the same witness and make the announcement beforehand as to who will handle the witness, that the witness be cross-examined by Dr. USAMI perhaps -- examined rather -- by Dr. USAMI, and let Mr. Warren, who is working with him -- with this witness; in that instance there, why, I would think it would fill pretty near the needs and requirements of what your Honor said and that is the way we had intended to work.

THE PRESIDENT: Well, you were going to say something when I interrupted, Mr. Logan.

MR. LOGAN: I thought I had finished what I said, but it would seem to me that if we were extended that privilege or when the special circumstances arose, maybe it would be explained and discussed at that time when there was a conflict of interests. I mean, if we would be permitted to have American counsel and a Japanese counsel working in sort of a team for each witness that would be helpful. Of course, Japanese attorneys too might have objections that they wish to make and I don't

think it would be right to foreclose either of us. I think you will find that we are all trying to expedite this trial as much as possible and keep down unnecessary objections. It is only when we really feel it is vitally affecting our clients that we are making objections which we consider substantial. I don't think there is inclination on either the part of the American or Japanese attorneys to delay proceedings by making frivolous objections. The ones that we make we believe have substance to them and we feel we all have the right, but we want to go along to a certain extent so long as there are individual clients who are not prejudiced by any ruling whereby we are foreclosed from making any objections. We will try to work it out as expeditiously as possible.

THE PRESIDENT: There is one point you said that I do not agree with. You said that where a Japanese examines in chief an American should do the objections, because, in those circumstances, the question objected to is answered before the Japanese counsel appreciates what it is.

MR. LOGAN: That is right.

THE PRESIDENT: Well, that did happen this morning.

MR. LOGAN: That is right.

THE PRESIDENT: It happened three times.

MR. LOGAN: It has happened in the past.

THE PRESIDENT: Why should that not apply to the case of an examination in chief by an American counsel? Wouldn't that also warrant the Japanese counsel to deal with objections.

MR. LOGAN: That is what I said when we started this hearing. When we started this hearing that is what I said and vica versa. It is the same thing in reverse to a Japanese attorney or an American attorney.

THE PRESIDENT: But it would be harder to see a Japanese deal with objections where an American has examined in chief then. Your reason would apply then.

MR. LOGAN: Yes, and some of these Japanese attorneys, as your Honor probably realized -- has seen them in action -- they know what type of examinations to make. There are about three of them there who I think do an excellent job on raising objections, but those three men unfortunately understand English. I do not know about some of the others. There may be one or two others who don't understand English who would be in the same position as we would be in.

THE PRESIDENT: Colonel Warren, would you restate that proposition you put to me so I might deal with it now?

MR. WARREN: Yes, sir. What I had in mind was on the witnesses we are to use. We had worked out a plan whereby there would be a Japanese counsel and an American counsel assigned to that witness. In most instances the Japanese counsel will examine in chief and the American counsel would take care of the objections raised by the prosecution or any objection on cross-examination we thought it was necessary to make, without, of course, intending to preclude Japanese counsel from making his own objection at the time. In other words, we will work it out in an agreement between the two counsel before we start.

That is the only feasible method I saw fit to present to the Tribunal with the least waste of time. I have given it considerable thought before this question even came up, your Honor.

THE PRESIDENT: That means that only one counsel would do the objections.

MR. WARREN: Yes, that is quite true; only one as regards that particular witness.

THE PRESIDENT: Well, Major Furness doesn't think he can agree with that, but he will try to fall in with it.

MR. FURNESS: We will try.

MR. McMANUS: If your Honor pleases, on a

particular witness and he is being handled by the man who is conducting the phase; now, for instance, Colonel Warren and Captain Brooks have the Manchurian phase. Naturally my man was War Minister there and if SHIGEMITSU should come in I don't know which might be objectionable. As far as I am concerned, concerning my man, I would like to get up and make an objection on his behalf, individually.

THE PRESIDENT: Yes.

MR. CUNNINGHAM: That situation will arise rarely, we feel. We hope that there will be no conflict of interest and I don't think we should worry so much about that, but should be protected in our right to get up and object under those circumstances.

MR. BROOKS: In a case of that type it does arise. There are not going to be twenty-six objections at the same time. There may possibly be one or two. There will only be one man coming up because he has an objection and because he represents his client he wishes to make the objection. He does not have the authority to delegate that to someone else, because he is a man of record and binds his client. He should not be required to give that to someone else, who, if he did give it, would bind himself in making it and he does not have any authority in record to make it. Half of the man's client

is pushing for an objection too.

MR. WARREN: Can we have a list, your Honor? The man we selected to take care of objections is to be told, if somebody wanted to make an objection on his own behalf, is to tell that man and let him tell the Tribunal that the counsel desired to make an objection on his own behalf and ask the Tribunal to give him permission to do it.

MR. BLAKENEY: What would you gain that way? We would lose time if everything had to be explained.

MR. LAZARUS: Mr. President, I am sure the Court must feel that we haven't abused our privilege of getting up there and making objections. If we could try this system as we go along, and if we continue not to abuse it, perhaps the Court will feel ultimately that we will settle down among ourselves and find that one man would be sufficient to do this, and, rarely, as Colonel Warren and Mr. McManus has stated, would it be necessary for still another person, because of his individual interest, to get up and make an objection. I am sure we haven't abused our privilege, and the Court can trust us to continue it.

THE PRESIDENT: I don't think you have.

What do you say, Mr. Tavenner? What is your view?

MR. TAVENNER: Well, I rather feel that if a vital conflict in interest appears from the cross-examination by the prosecution, that in an unusual situation of that kind, of course, not applying to all of them, that counsel should have some opportunity to make a special objection.

THE PRESIDENT: You have got no objection to the proposal that Colonel Warren put and Mr. Logan supported?

MR. TAVENNER: No, sir. Yes, I think that ought to work it out in nearly all cases.

THE PRESIDENT: Of course, the defense have come to no agreement about it and I wasn't in a position to give any decision.

Well, it may come up this afternoon and then, of course, the defense might put into operation what they proposed to me today as to what should be done and then the Court can decide. I will explain and the Court can decide.

MR. LEVIN: Mr. President, I would like to just add one word. This is a parallel situation. As a matter of fact, the other situation was more difficult, that is, the matter of cross-examination during an entire presentation of prosecution's case. Only in three or four instances did a very large number of the defense cross-examine and that was with the strategic witness like TANAKA and

the man from the Department of State --

MR. LOGAN: Ballantine.

MR. LEVIN: Who was that, Ballantine?

MR. LOGAN: Yes.

MR. LEVIN: It may be true in the case of one other witness. I can only remember three that more than two or three defense counsel cross-examined and I think that the Court will find that there will be few situations where more than one American counsel would want to make an objection outside of the counsel who is conducting that examination. If that is the situation it seems to me that it may very well be tried out that way and see how we get along, and if it gets to a situation where it does not work out well, the Court can always change the rule.

When I was making the suggestion before I only mentioned Mr. McManus's accused simply as an illustration. I knew, of course, that he was speaking as one representing and handling the phase of the First Division.

MR. FURNESS: I think Colonel Warren's suggestion that if a man is asked to make an objection and he says he doesn't want to he should state that to the Court, and I assume in that case, the Court will hear the other man.

THE PRESIDENT: The Court has got to hear the

other man.

MR. CUNNINGHAM: That creates an embarrassing situation sometimes which we would like to avoid. We would like to avoid asking permission or asking the counsel conducting the examination if he will ask a question. Then, after being turned down, to come up and ask it yourself. It puts you in a bad light, whereas, if you see yourself and know perhaps this will be embarrassing and ask the Court yourself, it is much more effective from the standpoint of the defense.

Our objection is what we are interested in. Our question is another thing. But our question as to what has been asked is something pretty personal and you almost always have to do it yourself in order to be effective.

THE PRESIDENT: You can't very well ask the counsel with conflicting opinion to put it in.

MR. FURNESS: In spite of the fact that these rules are in effect I don't know anybody has exercised that right to make further direct examination, or counsel to make cross-examination.

MR. LOGAN: It has arisen.

MR. LAZARUS: It might take a lot of time if he were to run up and ask Colonel Warren in charge of objections, "Here is what I want you to object to on this

ground," because I am the one that happens to see this ground and he has to ask the Court to bear with me a moment until I hear what he says too. Then he will get up to the mike and several seconds have been lost. If I get up on this ground immediately I am sure the Trial will go faster that way.

THE PRESIDENT: Anything that will make it go faster is welcome.

MR. LAZARUS: If I have to tell Colonel Warren to hold up until we make our objection, if that happens twenty times a day that is an awful waste of time, sir.

(Whereupon, at 1325, the proceeding was concluded.)

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